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No. 606

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

INDEX

	Page
Appendix	28
Cases:	
Brantley v. *Georgia*, 217 U. S. 284	2
Burton v. *United States*, 202 U. S. 344	2, 11, 26
Costello, Ex parte, 8 F. 2d 386	16
Dreyer v. *Illinois*, 187 U. S. 71	3
Grafton v. *United States*, 206 U. S. 333	25
Keerl v. *Montana*, 213 U. S. 135	3
Kepner v. *United States*, 195 U. S. 100	3, 5, 18, 26
Miller v. *United States*, 317 U. S. 192	6
Murphy v. *Massachusetts*, 177 U. S. 155	2
Palko v. *Connecticut*, 302 U. S. 319	4, 20
Reed, Ex parte, 100 U. S. 13	5
Sanford v. *Robbins*, 115 F. 2d 435, certiorari denied, 312 U. S. 697	7, 9, 18
Simmons v. *United States*, 142 U. S. 148	3
Stroud v. *United States*, 251 U. S. 15	2
Swaim v. *United States*, 165 U. S. 553	5, 19
Thompson v. *United States*, 155 U. S. 271	3, 24
Trono v. *United States*, 199 U. S. 521	4, 10, 19, 20
United States v. *Ball*, 163 U. S. 662	2
United States v. *Perez*, 9 Wheat. 579	2, 24
Statutes:	
Act of July 1, 1902, c. 1369, Sec. 5, 32 Stat. 691, 692	25
Act of August 29, 1916, c. 418, 39 Stat. 619, 650, 668	6, 19
Act of January 20, 1944, c. 3, 58 Stat. 5, 28 U. S. C., Supp. V, 92	6
R. S. 1199	8
Articles for the Government of the Navy (34 U. S. C. 1200)	16
Articles of War of 1920:	
AW 29 (10 U. S. C. 1500)	16
AW 37 (10 U. S. C. 1508)	7
AW 39 (10 U. S. C. 1510)	27
AW 40 (10 U. S. C. 1511)	5, 10, 16, 19
AW 46 (10 U. S. C. 1517)	12, 13, 14
AW 47 (10 U. S. C. 1518)	12, 14, 16
AW 48 (10 U. S. C. 1519)	12, 14
AW 49 (10 U. S. C. 1520)	12, 15, 16, 17, 21
AW 50 (10 U. S. C. 1521)	15
AW 50½ (10 U. S. C. 1522)	5, 6, 10, 15

Statutes—Continued
Articles of War of 1920—Continued — Page
AW 52 (10 U. S. C. 1524) — 15
AW 70 (10 U. S. C. 1542) — 13
AW 93 (10 U. S. C. 1565) — 25
AW 94 (10 U. S. C. 1566) — 13
AW 96 (10 U. S. C. 1568) — 25
AW 111 (10 U. S. C. 1583) — 6
Older Articles of War:
AW 24 of 1786 (Clause 3), Res. of May 21, 1785, 30 J. Cont. Cong. 316, 321 — 6
AW 90 of 1806, Act of April 10, 1806, c. 20, 2 Stat. 359, 370 — 6
AW 58 of 1874, R. S. 1342 — 25
AW 62 of 1874, R. S. 1342 — 25
AW 102 of 1874, R. S. 1342 — 25
AW 114 of 1874, R. S. 1342 — 6
AW 40 of 1916, Act of August 29, 1916, c. 418, 39 Stat. 619, 650 — 8
AW 111 of 1916 — 6
Miscellaneous:
1 Bull. JAG 212, par. 395 (18) — 6
2 Bull. JAG 60, par. 395 (18) — 6
Dig. Op. JAG (1912–1940), pars. 395 (2), 395 (21) (2) — 6
Establishment of Military Justice, Hearings before the Senate Committee on Military Affairs on S. 64, 66th Cong., 1st sess. (1919) — 8
GCMO 14 of 1941 — 17, 21, 28
GCMO 100 of 1943 — 17, 21, 31
GCMO 152 of 1943 — 17, 21, 34
GCMO 436 of 1944 — 21, 38
GCMO 240 of 1946 — 7, 22, 23
General Orders No. 169, War Dep't, 1917 — 17
General Orders No. 7, War Dep't, 1918 — 8, 17
Ives, *Military Law* (1879), 200–202 — 17
MCM, pp. 216–217 — 15, 21
13 Op. A. G. 459 — 16
26 Op. A. G. 239 — 16
Rigby, *Military Penal Law: A Brief Summary of the 1920 Revision of the Articles of War* (1921), 12 J. Crim. L. 84 — 5
Wigmore, ed., *Military Law and War-Time Legislation* (1919), 604–606, 808–810 — 8, 17
1 Winthrop, *Military Law & Precedent* (2d. 1896):
*683 — 11
*693 — 17
*694–702 — 5

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Pursuant to permission granted at the oral argument on April 2, we submit herewith additional authorities bearing on the finality, for purposes of double jeopardy, of the court-martial proceedings against the respondent Radovich.

I

A. We start with the familiar and recognized principles governing double jeopardy in the civilian criminal courts. Where a verdict and judgment of conviction in such a court have been reversed on appeal, that verdict and judgment, it is clear, will not sustain a plea of double jeopardy.

Murphy v. *Massachusetts*, 177 U. S. 155, 159; *Brantley* v. *Georgia*, 217 U. S. 284; *Stroud* v. *United States*, 251 U. S. 15, 18. Similarly, when an indictment is dismissed on appeal, a new indictment may be returned against the defendant, which, manifestly, need not follow the terms of the old indictment. *United States* v. *Ball*, 163 U. S. 662, 672. And, where the judgment is reversed for errors committed at the trial and not on grounds invalidating the indictment, the prosecutor may, if he deems such a course desirable, obtain a new indictment charging the same offense in a different manner; when he then proceeds on the new rather than the old indictment, the new prosecution cannot be barred by a plea of double jeopardy. *Burton* v. *United States*, 202 U. S. 344, 380.

The expressed rationale of some of the foregoing authorities is that, by taking the appeal, the defendant himself waives the protection against a second trial, because he has himself caused the first judgment to be set aside. But other decisions show that the validity of the second trial rests on grounds quite independent of waiver whenever the first trial was, for any reason, an invalid one, or did not proceed to final judgment.

Thus, where the jury at the first trial disagreed and was discharged, the new trial, it was early held, did not subject the defendant to double jeopardy. *United States* v. *Perez*, 9 Wheat. 579;

see *Dreyer* v. *Illinois*, 187 U. S. 71; *Keerl* v. *Montana*, 213 U. S. 135. Certainly no waiver can be spelled out in that situation; nor can it be said that the result was one which the defendant brought about. Similarly, where a mistrial is declared and the jury is discharged because of the misconduct of a juror (*Simmons* v. *United States*, 142 U. S. 148, 153) or because one of the petty jurors was on the grand jury panel which returned the indictment on which the defendant is being tried (*Thompson* v. *United States*, 155 U. S. 271), the proceedings up to the point of discharge will not sustain a plea of double jeopardy; and this is so even when the jury is discharged over the defendant's objections (*Simmons* v. *United States*, *supra*). The principle of these cases, we think, is that a trial conducted in a manner contrary to established principles of justice is not such a trial as will support a plea of double jeopardy.

B. In *Kepner* v. *United States*, 195 U. S. 100, this Court by a bare majority held that the prohibition against double jeopardy was not confined to jeopardy in a new and independent case, but forbade jeopardy in the same case where the second trial, under Philippine law, was at the instance of the prosecution and not on the defendant's motion. The Court rejected the view advanced by Mr. Justice Holmes, speaking for the dissenting Justices, that (195 U. S. at 134) "The jeopardy

is one continuing jeopardy from its beginning to the end of the cause," and that "there is no rule that a man may not be tried twice in the same case." Subsequently, in *Trono* v. *United States*, 199 U. S. 521, the Court held that, where the defendant himself appealed, the Supreme Court of the Philippines might, under Philippine law, find him guilty of a more serious offense and impose a heavier sentence than did the court of first instance.

The Court's latest expression on the subject, upheld, as against a contention that the Fourteenth Amendment was violated, a Connecticut statute giving the State a right of appeal. There the defendant had been found guilty at the first trial of murder in the second degree and sentenced to life imprisonment. The State appealed and the judgment was reversed. At the second trial, defendant was found guilty of murder in the first degree and sentenced to death; that conviction was upheld here. *Palko* v. *Connecticut*, 302 U. S. 319. While the case involved the Fourteenth Amendment,[1] the opinion, the last deliv-

[1] "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? * * * The answer must surely be 'no.' * * * The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from

ered by Mr. Justice Cardozo, intimates strong doubts as to the correctness of the *Kepner* holding. 302 U. S. at 322–323.

C. The basic question in the present case is whether the automatic appellate review of court-martial proceedings prescribed by AW 50½ involves an appeal by the Government, as in the *Kepner* case, or an appeal by the accused, as in the *Trono* case.

We think it clear that this is not a *Kepner* situation. There the prosecution appealed to set aside an acquittal. Similarly, in the *Palko* case, the prosecution appealed to set aside a verdict of a lower degree of murder. Here the prosecution does not appeal at all. It cannot appeal. The old military practice whereby, in proceedings in revision, a court-martial could at the instance of the reviewing authority reconsider an acquittal and then convict the accused, or reconsider a sentence with a view to increasing its severity (see 1 Winthrop, *Military Law & Precedents* (2d ed. 1896) *694–702; *Swaim* v. *United States*, 165 U. S. 553, 563–565; cf. *Ex parte Reed*, 100 U. S. 13), is now expressly forbidden by AW 40. Indeed, that was the very purpose of the 1920 amendment.[2]

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the corrosion of substantial legal error. * * * The edifice of justice stands, its symmetry, to many, greater than before." 302 U. S. at 328.

[2] See Rigby, *Military Penal Law: A Brief Summary of the 1920 Revision of the Articles of War* (1921) 12 J. Crim. L. 84.

The automatic appeal is in no sense an appeal by the prosecution. To the contrary, it is an automatic appeal taken for the benefit of the accused, who, under the prevailing practice, is not bound by waivers that his counsel may have made at the trial.[3] Article of War 50½ constitutes an enlightened modification of penal law, which gives every accused the benefit of appellate scrutiny, without requiring him to retain counsel or to possess the funds necessary to prepare the record.[4] Such a procedure is obviously wholly different, both in substance and purpose, from the prosecution's appeal of the acquittal involved in the *Kepner* case.

Not only that, but Radovich here joined in the automatic appeal which the law accorded him. As Mr. Robb stated at the argument, Radovich's counsel appeared orally before the Board of Review, urging that the conviction be set aside as legally insufficient. They filed a brief in support

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[3] See e. g., Dig. Op. JAG (1912–1940), pars. 395 (2), 395 (21) (2); 1 Bull. JAG 212, par. 395 (18); 2 *id.* 60, par. 395 (18).

[4] A soldier tried by court-martial has been entitled to a verbatim copy of the proceedings without charge since 1786. Clause 3 of AW 24 of 1786, Res. of May 31, 1786; 30 J. Cont. Cong. 316, 321; AW 90 of 1806, Act of April 10, 1806, c. 20, 2 Stat. 359, 370; AW 114 of 1874, R. S. 1342; AW 111 of 1916, Act of August 29, 1916, c. 418, 39 Stat. 619, 650, 668; AW 111 of 1920, 10 U. S. C. 1583. But a defendant tried in a federal court, lacking funds, has only had this privilege since the Act of January 20, 1944, c. 3, 58 Stat. 5, 28 U. S. C., Supp. V, 9a. See *Miller* v. *United States*, 317 U. S. 192.

of their contention that "the error complained of has injuriously affected [Radovich's] substantial rights." AW 37; 10 U. S. C. 1508. This differs not at all in substance from the ordinary appeal taken by a defendant in a civilian criminal trial. And certainly Radovich never repudiated the appellate action in the Office *of the* Judge Advocate General that resulted in the setting aside of a sentence which, even as cut down by the reviewing authority, still carried dismissal and two years' confinement at hard labor. See GCMO 240, set out at U. S. Br. 122–125. He embraced the results of the action taken by reason of the automatic appeal. He never offered to serve the term of confinement imposed, nor did he seek to compel the Secretary of War to issue a certificate evidencing the dismissal from the service which the court-martial had adjudged. Having accepted the benefits of the appeal which the law provided for him, he cannot now be heard to deny that he is bound by its burden, viz, that there has not been a valid trial. We think that in this situation the circumstance that the noting of the appeal was automatic by virtue of AW 50½ does not make the appeal any less the act of or the result effected by Radovich.

The case of *Sanford* v. *Robbins*, 115 F. 2d 435 (C. C. A. 5), certiorari denied, 312 U. S. 697, is instructive in the present connection. There the accused was tried for rape and sentenced to death

under the 1916 Articles of War (39 Stat. 650–670), which made no provision for a new trial. But the Acting Judge Advocate General held that the errors committed had been so fundamental that they reached the very jurisdiction of the court martial,[5] and the President, on the strength of that holding, issued an order stating "that, by

[5] See R. 70–104, No. 613, Oct. T., 1940. There was a review by a Special Board of Review in the Office of the Judge Advocate General, which is signed by S. T. Ansell, Acting Judge Advocate General. The holding on the point noted in the text was as follows (R. 103):

"It is the judgment of this office that in this case a lawful trial can and should be ordered, and that such a course is sustainable, first, upon the view that the proceedings had are a nullity, and, secondly, that even if it should be assumed that the errors here had in view did not have such destructive effect upon the proceedings as that attributed to them, still where this office, upon the review which the statute requires it to make, pronounces the proceedings invalid for prejudicial error, and the President, as confirming authority, so holds and declares, he may order another trial in the exercise and by virtue of his confirming authority alone."

At that time, 1918, there was an automatic appellate review provided for, not in the Articles of War, but prescribed by General Orders No. 7, War Department, January 17, 1918 (see Wigmore, ed., *Military Law and War-Time Legislation* (1919), pp. 604–606, 808–810). At that time, also, the 40th Article of War of 1916 provided that (39 Stat. at 657), "No person shall be tried a second time for the same offense."

The reference in the opinion to "the statute" is doubtless to R. S. 1199, directing that the Judge Advocate General "revise" the proceedings of all courts-martial. The scope of that provision was a subject much controverted in the War Department in 1917–1919. See *Establishment of Military Justice*, Hearings before the Senate Committee on Military Affairs on S. 64, 66th Cong., 1st sess. (1919) *passim*.

reason of the errors, jurisdictional and fundamental, committed during the trial, to the manifest injury of the accused, the said trial and proceedings are invalid."* He ordered a new trial. At the new trial, accused's plea of double jeopardy was overruled by the court-martial, and he was found guilty and sentenced to life imprisonment. This second sentence was approved by the President in 1920. Nineteen years later, the accused sued out a writ of habeas corpus, and it was that proceeding which was before the Fifth Circuit in *Sanford* v. *Robbins*.

The Circuit Court of Appeals held, reversing the district court, that the second court-martial's action in overruling the plea of double jeopardy was not reviewable on habeas corpus, but that, in any event, its ruling was correct. Judge Sibley said (115 F. 2d at 439):

> * * * In the present case there was no express request for a new trial made to the President by the accused. Yet since he was condemned to death and might be helped and could not possibly be hurt by a new trial, his consent to it ought to be presumed in favorem vitae. As against his country a citizen and a soldier has not the right to elect to die. Robbins has in fact never desired to be executed. He wished to take advantage of the President's failure to confirm the old sentence, but to

* R. 23, No. 613, Oct. T., 1940.

> repudiate the condition annexed that there be a new trial. He would go free. We hold the request for and consent to a new trial by one condemned to death is to be presumed, the presumption being true in fact and required by a sound public policy.

This view, of course, supports our contentions as to the nature of the automatic appeal on behalf of the defendant, first introduced in statutory form in 1920 in AW 50½. In other words, the situation presented is that of the *Trono* case, i. e., a defendant's appeal, but with greater advantages for the accused. Trono's sentence was increased on appeal, and he was found guilty of a more serious offense. This cannot be done at military law today, either by the reviewing or confirming authority, see AW 40 (10 U. S. C. 1511), or by the second court-martial at the rehearing (i. e., new trial) provided for by AW 50½ (10 U. S. C. 1522). AW 50½ expressly states,

> Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding. * * *

Or, in short, summing up the foregoing discussion, the situation in the present case is identical

in substance with that considered by this Court in *Burton* v. *United States*, 202 U. S. 344, 380. Radovich was convicted. An appeal was taken on his behalf. He joined in that appeal and pressed it. The conviction was set aside on grounds not going to the merits. Radovich embraced the benefits of the appellate action. The original charges were then no longer pressed. The United States proceeded against him, not under the old military charges, but upon a new civil indictment. In those circumstances the *Burton* case is conclusive against the validity of his plea of double jeopardy.

II

A. The incompleteness of the military proceedings is brought more clearly into focus when the nature of a sentence by court-martial is considered. Until such a sentence has been acted upon by the reviewing authority, and, as here, by the confirming authority as well, it is something inchoate and incomplete. The classical view is set forth by Winthrop (1 *Military Law & Precedents* (2d ed. 1896) *683).

> While the function of a court-martial is, regularly, completed in its arriving at a sentence or an acquittal, and reporting its perfected proceedings, its judgment, so far as concerns the *execution* of the same, is incomplete and inconclusive, being in the nature of a *recommendation* only. The

> record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it, and such opinion remains without effect or result till reviewed and concurred in, or otherwise acted upon, by him. This superior, sometimes referred to as the Approving or Confirming Authority, but more commonly known in military parlance as the Reviewing Authority or Officer, is, as will presently be more fully indicated, the official—military commander or Commander-in-chief—by whom the court was originally constituted and convened, or—where there has been a change in the command since the convening—his successor therein. In some cases indeed where, beside the approval of the original commander, further confirmatory action by a higher commander or the President is required by law, there are in fact, as will also be pointed out, two separate reviewing officers. It is the function of such officer (or officers) which we now proceed to consider. [Italics in original.]

The sentence of the court-martial that tried Radovich, therefore, was not a final judgment until it was acted on by the reviewing authority, here the Commanding General, First Air Force, under AW 46 and AW 47 (10 U. S. C. 1517, 1518), and by the confirming authority, here the President, under AW 48 and AW 49 (10 U. S. C. 1519, 1520), since it was a sentence extending

to the dismissal of an officer." Consequently, the action of the Board of Review and the Judge Advocate General here was really like that of a judge who declares a mistrial prior to the termination of the proceedings.

B. The foregoing analysis will perhaps appear more clearly against the background of an illustration showing the actual travel of a case involving an officer tried by general court-martial and sentenced to dismissal, i. e., a sentence which requires confirmation by the President. For the sake of simplicity we assume a trial in the same court-martial jurisdiction as that involved in the present case, viz, the First Air Force.

We will suppose that Captain Doe, on duty with that Air Force, has embezzled money of the United States furnished for the military service, in violation of AW 94 (10 U. S. C. 1566). The charges against him, after being investigated and examined by the staff judge advocate (AW 70; 10 U. S. C. 1542), are referred for trial by the Air Force Commander to a general court-martial appointed by him.

The trial takes place, the court-martial finds Captain Doe guilty, and he is sentenced to dismissal and a term of confinement. The record of trial is then transmitted to the staff judge advocate pursuant to AW 46 (10 U. S. C. 1517).

(a) If the staff judge advocate holds the record of trial legally insufficient, he will recommend

that the proceedings be disapproved. The Air Force Commander then acts on the record pursuant to AW 46 and 47 (10 U. S. C. 1517, 1518). If he concurs in the recommendation of his staff judge advocate, he will disapprove the findings and sentence. If he determines not to order a rehearing, for the reason, e. g., that the evidence is insufficient, he will disapprove the findings and sentence and publish the result in General Court-Martial Orders issued from Headquarters First Air Force. Such a disapproval would be equivalent to an acquittal, would be a final trial within the sense of AW 40, and would bar a further trial for the same offense.

(b) If the Air Force Commander disapproves the findings and sentence because of irregularities or errors at the trial, and determines to order a rehearing under AW 47 (c), the case goes back to be tried by a new court. In that event, there has been no final trial within the sense of AW 40.

(c) If the staff judge advocate advises that the record is legally sufficient and the Air Force Commander concurs, he approves the sentence and forwards it under AW 48 (10 U. S. C. 1519), for confirmation by the President. (This is what was done in the Radovich case.)

After action by the Air Force Commander, who is the reviewing authority, the case of Captain Doe goes to the Board of Review in the Office

of the Judge Advocate General. Here again there are several different possibilities.[7]

(d) The Board of Review may hold the record of trial legally insufficient. (This is what happened here, in the Radovich case.) In that event, the record is not forwarded to the President at all (see MCM, pp. 216–217), but is returned to the reviewing authority. Up to this point, there has been no trial within the meaning of AW 40. The reviewing authority may then order a rehearing before a new court or he may dismiss the charges. If he orders a rehearing, the subsequent proceedings are dealt with as indicated in subparagraph (b). If he dismisses the charges, then there is final action within the meaning of AW 40. (In the present case, as we have shown (U. S. Br. 63–64), he did neither.)

(e) The record of trial may be held legally sufficient. It is then transmitted to the Secretary of War for action by the President. The President acts under AW 49 (10 U. S. C. 1520); he may confirm the sentence, he may commute it (AW 50, 10 U. S. C. 1521), he may remit part of it (AW 50), he may suspend it (AW 52, 10 U. S. C. 1524), or he may disapprove it. His

[7] In order to simplify the discussion, we assume that The Judge Advocate General concurs in the holding of the Board of Review, and that there is no occasion for the Secretary of War, under the third subparagraph of AW 50½, as amended, to resolve the differences between the two

action is published in War Department General Court-Martial Orders. In all of the possibilities noted, there has been a trial within the meaning of the 40th Article of War. The President also may ignore the recommendation that is made and, on his own initiative, order a rehearing. AW 49 (c). In that event, there has been no trial within the meaning of AW 40. The record goes back to the reviewing authority, and the new court is appointed by that authority. In the event of a conviction, the record goes forward once more, as indicated above in subparagraph (c).

And, of course, if there is an acquittal by the court-martial, that is final. AW 29 (10 U. S. C. 1500).

C. There is nothing in *Ex parte Costello*, 8 F. 2d 386 (E. D. Va.), cited by Mr. Robb at the argument, contrary to the foregoing analysis. That case involved the Articles for the Government of the Navy (34 U. S. C. 1200), which, like the Articles of War prior to 1920, have no provision for a Board of Review. *Ex parte Costello* holds, relying upon and following some opinions of the Attorney General (13 Op. A. G. 459; 26 Op. A. G. 239), that a disapproval is equivalent to an acquittal.

But the disapproval there considered is the disapproval by the reviewing or confirming authority contemplated by Articles of War 47 (a),

47 (b), 49 (a) and 49 (b).* It is the disapproval considered in the supposititious case above at subparagraphs (a) and (c). It is the disapproval, in the naval practice, under Article of the Government of the Navy 54 (b). Such a disapproval is entirely different from a holding of legal insufficiency by the Board of Review and the Judge Advocate General under AW 50½—action for which there is no counterpart in the Navy articles.

The Army had no such procedure, either, prior to the First World War. The traditional Army practice was that new trials were never ordered except where jurisdictional defects made the first trial a nullity, or where the accused himself requested a retrial. See Ives, *Military Law* (1879), 200–202; 1 Winthrop, *Military Law & Precedents* (2d ed. 1896) *693. It was not until the First World War that provision was made for routine review of proceedings in the Office of the Judge Advocate General prior to the execution of sentences of death (General Orders No. 169, War Dep't, 1917) or of sentences of dismissal or dishonorable discharge not suspended (General Orders No. 7, War Dep't, 1918; see Wigmore, ed., *Military Law and War-Time Legislation* (1919),

* Recent examples of Presidential disapprovals under AW 49 may be found in GCMO 14 of 1941, GCMO 100 of 1943, and GCMO 152 of 1943, discussed below, p. 21.

pp. 604–606, 808–810). Even so, new trials, as in *Sanford* v. *Robbins*, 115 F. 2d 435, *supra*, were rested on jurisdictional grounds, and at that were thought by some to be of doubtful validity.[9] Moreover, the review provided for by the cited General Orders was still advisory, and not binding on officers exercising court-martial jurisdiction. It was not until the enactment of AW 50½ in 1920 that the Board of Review and the Judge Advocate General, agencies wholly outside the chain of military command, could independently set aside a sentence of a court-martial on the grounds of legal insufficiency.

D. The changes made by Congress in AW 40 in 1920 reflect the nature of a court-martial sentence, i. e., that it is inchoate until acted upon, and reflect also the restrictions then placed on the return of proceedings for revision and the provision made for a rehearing, i. e., a new trial, when the record of the first trial was held legally insufficient.

In 1920, Congress prohibited proceedings in revision looking to reconsideration of acquittals, i. e., the kind of appeal by the prosecution considered in *Kepner* v. *United States*, 195 U. S. 100. It likewise prohibited proceedings in revision

[9] It is perhaps significant that, when the court-martial at Robbins' second trial overruled his plea of double jeopardy, it said (115 F. 2d at 437) that the new trial was "possibly not in strict accord with the 40th Article of War and the Fifth Amendment of the Constitution."

looking to increased sentences. See *Swaim* v. *United States*, 165 U. S. 553; cf. *Trono* v. *United States*, 199 U. S. 521. And, while providing for new trials, Congress expressly stated that, where the first trial was set aside for invalidity in the proceedings before the sentence had been finally acted on, the first trial would not constitute jeopardy. In other words, Congress adopted the rule of the cases discussed above, *supra*, pp. 1–3, and applied that rule to military proceedings.

AW 40, which in 1916 had simply stated (39 Stat. at 657) that "No person shall be tried a second time for the same offense," was carefully rewritten. As enacted in 1920, it provides (41 Stat. at 795):

> No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.
>
> No authority shall return a record of trial to any court-martial for reconsideration of—
>
> (*a*) An acquittal; or
>
> (*b*) A finding of not guilty of any specification; or
>
> (*c*) A finding of not guilty of any charge, unless the record shows a finding

of guilty under a specification laid under that charge, which sufficiently alleges a violation of some Article of War; or

(*d*) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial, in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited.

The only differences between double jeopardy under AW 40 in its present form and under *Trono* v. *United States*, 199 U. S. 521, are two—and both are favorable to the accused. First, his sentence cannot be increased as a result of the appeal. Second, the appeal is taken on his behalf without the necessity of his asking that it be taken. And, we might add, the provisions of AW 50½, quoted *supra*, p. 10, preclude the result approved in *Palko* v. *Connecticut*, 302 U. S. 319, i. e., a more severe sentence on the new trial.

We will not repeat here what we have already discussed at length above, viz., that an automatic appeal which is taken on behalf of the accused and whose benefits he embraces is in no sense an appeal by the prosecution.

E. The appellate procedure introduced into the administration of military justice by the 1920 re-

vision of the Articles of War requires a reexamination of the "disapproval equals acquittal" doctrine relied on by Radovich here.

(1) Where the President, acting under AW 49 (10 U. S. C. 1520), personally disapproves the findings and sentence, such action constitutes an acquittal, and AW 40 bars further trial. That is the precise kind of action considered in *Ex parte Costello,* 8 F. 2d 386, *supra.* Recent examples of Presidential disapprovals are GCMO 14 of 1941, GCMO 109 of 1943, and GCMO 152 of 1943, Appendix, *infra,* pp. 28–37. In all of those cases, as the General Court-Martial Orders show, the President took action in person. Here, however, in the *Radovich* case, the proceedings were never even submitted to the President; see the practice set out at MCM, pp. 216–217.

(2) Where the Board of Review and the Judge Advocate General have found a record of trial legally insufficient, the convening authority has then to determine whether he will order a rehearing of the charges. He may do so, in whole or in part. When he determines that certain specifications are not to be retried, he uses appropriate language to that end.

A recent example may be found in War Department GCMO 436 of 1944, Appendix, *infra,* pp. 38–41, which announces those portions of the charges against the officer concerned which were not referred for rehearing. The order expressly

states that certain specifications "are withdrawn and will not be further prosecuted." This is a dismissal of the charges which constitutes final action within the meaning of AW 40.

(3) Here, however, there was no action by any reviewing or confirming authority. GCMO 240 of 1946, which deals with Radovich's case, is not a disapproval by the President. It is not a dismissal of the charges by the convening authority. It is simply an announcement that the independent judicial agency outside the chain of command—the Board of Review and the Judge Advocate General—have held the record of trial legally insufficient. Neither agency had power to order a rehearing or to direct that one be not had. General Court-Martial Orders 240 simply announces the fact of disapproval because of the holding of legal insufficiency:

> The record of trial was examined by the Board of Review in the Office of The Judge Advocate General and was held legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General concurred in said holding. Pursuant to Article of War 50½, the findings of guilty and the sentence are disapproved.[10]

In other words, GCMO 240 in *Radovich's* case reflects action by the Board of Review and the

[10] The words, "By order of the Secretary of War", do not import personal action by the Secretary. They appear on every War Department GCMO, including those announcing action by the President.

Judge Advocate General, while the other GCMO's reflect action taken in command channels. Only the latter constitutes final action within AW 40.

When the proceedings in Radovich's case were initially disapproved under AW 50½ and when thereafter the Commanding General, First Air Force, took no action looking either towards dismissal of the charges or towards ordering a rehearing, the military charges were in the situation of a civil indictment which has been reversed on appeal and where the prosecutor has not yet decided whether to retry the defendant or to *nolle prosequi* the indictment. Later, by the time the War Department published GCMO 240,[11] Radovich had been convicted by a jury in a federal district court, his appeal had been taken, and his case was *sub judice* in the Circuit Court of Appeals. All that General Court-Martial Orders No. 240 did was to announce the fact of disapproval because of the holding of legal insufficiency; in no sense did it amount to an acquittal or a dismissal of the charges.

Consequently, we assert with confidence that in the present case, the court-martial proceedings against Radovich never were a trial in the sense of the 40th Article of War, and that, having regard to the nature of a military conviction which has not been finally acted on by the confirming

[11] GCMO 240 is dated July 26, 1946; the argument in the C. C. A. had been had on June 4 (R. 1467).

authority, the proceedings were not the kind of trial on which a plea of double jeopardy in the constitutional sense could be based. The situation is identical with the cases of mistrials for disagreement or invalidating error before the termination of the proceedings. *United States* v. *Perez*, 9 Wheat. 579; *Simmons* v. *United States*, 142 U. S. 148; *Thompson* v. *United States*, 155 U. S. 271. In the end, Radovich will have had only one valid trial.

F. While, as we have indicated, the military proceedings in this point did not amount to a trial in the sense of the 40th Article of War, Radovich strongly argues the contrary (Br. 37–38). But that narrow question is not dispositive of the plea in bar involved in the present case.

The present trial was had in a United States District Court. The governing double jeopardy provision is that contained in the Fifth Amendment, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb", and the governing authorities those just discussed. The circumstance that a new military trial might be barred by the statutory provisions of AW 40, or for any other reason, would not militate against a holding that the civil trial was not double jeopardy in the constitutional sense, in view of the incompleteness of the military proceedings. In other words, even if the military authorities had put it out of their power

to retry Radovich by court-martial by reason of dismissing the charges, such action would, in the subsequent civil trial, amount to no more than a *nolle prosequi*; and that, as the *Burton* case teaches, is no bar to a subsequent civil trial on a new indictment.

The soundness of this approach is confirmed by *Grafton* v. *United States*, 206 U. S. 333. Grafton was charged with manslaughter under old AW 62 (now AW 96, 10 U. S. C. 1568),[12] and was acquitted. He was thereafter charged with the crime of assassination under Philippine Law, for the same homicide, and convicted. This Court held that the second trial constituted double jeopardy. It reached that holding, not in reliance on the double jeopardy provision of the then Articles of War,[13] but on the basis of the double jeopardy provision of the Act of Congress establishing a civil government in the Philippines. See 206 U. S. at 345 and 355.[14]

We do not suggest that AW 40 gives an accused less protection before a court-martial than the Fifth Amendment accords a defendant on trial in

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[12] At that time, old AW 58 (now, in substance, AW 93, 10 U. S. C. 1565) was not applicable except in time of war, and manslaughter was laid, in time of peace, under the general article, old AW 62.

[13] AW 102 of 1874, R. S. 1342: "No person shall be tried a second time for the same offense."

[14] "* * * no person for the same offense shall be twice put in jeopardy of punishment * * *." Sec. 5 of the Act of July 1, 1902, c. 1369, 32 Stat. 691, 692.

a federal district court. We do say, however, that even if, as Radovich urges, he could not have been retried by court-martial because of the limitations of AW 40, because of what that Article holds to be a trial, it would not follow that, if the military proceedings had not amounted to jeopardy in the constitutional sense, he could not then be tried by a district court. After all, factors other than AW 40 could have prevented a rehearing by court-martial.[15] Here the military proceedings were never completed: They were set aside for reasons not going to the merits. In those circumstances they do not bar a subsequent trial on an indictment. *Burton* v. *United States*, 202 U. S. 344.

III

We are not certain to what extent this Court should consider the consequences of a contrary holding. Cf. Holmes, J., dissenting, in *Kepner* v. *United States*, 195 U. S. 100, 134.[16] But, obviously, if Radovich's plea of double jeopardy is sustained, he goes free: that plea bars his trial by any civil court, and being out of the service, he is

[15] E. g., intervening separation from the service.

[16] "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny. But I do not stop to consider or to state the consequences in detail, as such considerations are not supposed to be entertained by judges, except as inclining them to one of two interpretations, or as a tacit last resort in case of doubt."

no longer amenable to military jurisdiction, quite apart from the circumstance that the military statute of limitations has long since run. AW 39 (10 U. S. C. 1510).

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

APRIL 1947.

APPENDIX

GENERAL COURT-MARTIAL
ORDERS, No. 14

WAR DEPARTMENT,
Washington, July 23, 1941.

Before a general court martial which convened at Camp Blanding, Florida, May 5, 12, 13, and 14, 1941, pursuant to paragraph 5, Special Orders No. 112, Headquarters 31st Division, Camp Blanding, Florida, May 5, 1941, was arraigned and tried—

Second Lieutenant *Horace D. Hester* (O–366-390), 124th Infantry.

CHARGE I: "Violation of the 61st Article of War."

Specification 1.—"In that Second Lieutenant *Horace D. Hester,* 124th Infantry, did, without proper leave, absent himself from his organization at Camp Blanding, Florida, from about April 26, 1941, at 6:00 o'clock A. M., until about April 28, 1941, at 9:00 o'clock P. M."

Specification 2.—"In that Second Lieutenant *Horace D. Hester,* 124th Infantry, did, without proper leave, absent himself from his organization at Sanford, Florida, from about March 31, 1941, at 9:00 o'clock P. M., until about April 1, 1941, at 6:00 o'clock A. M."

CHARGE II: "Violation of the 85th Article of War."

Specification.—"In that Second Lieutenant *Horace D. Hester,* 124th Infantry, was, at Camp

Blanding, Florida, on or about March 16, 1941, found drunk while on duty as the Adjutant of the Second Battalion, 124th Infantry, on parade in the regimental parade ground."

CHARGE III: "Violation of the 95th Article of War."

Specification 1.—"In that Second Lieutenant *Horace D. Hester,* 124th Infantry, was, at Camp Blanding, Florida, on or about March 16, 1941, in a public place, to-wit, the regimental parade ground, drunk while in uniform."

Specification 2.—"In that Second Lieutenant *Horace D. Hester,* 124th Infantry, was, at Camp Blanding, Florida, on or about March 23, 1941, drunk in quarters, while in uniform."

Specification 3.—"In that Second Lieutenant *Horace D. Hester,* 124th Infantry, was, at Orlando, Florida, on or about March 31, 1941, in a public place, to-wit: Berger's Tavern, drunk and disorderly while in uniform."

To which charges and specifications the accused pleaded "Not Guilty."

FINDINGS

Of *Specification 1,* CHARGE I: "Guilty."
Of *Specification 2,* CHARGE I: "Not Guilty."
Of CHARGE I: "Guilty."
Of the *Specification,* CHARGE II: "Guilty."
Of CHARGE II: "Guilty."
Of *Specification 1,* CHARGE III: "Guilty."
Of *Specification 2,* CHARGE III: "Not Guilty."
Of *Specification 3,* CHARGE III: "Guilty."
Of CHARGE III: "Not Guilty, but Guilty of a violation of the 96th A. W."

SENTENCE

To be dismissed the service.

The sentence was adjudged May 14, 1941.

The following is the action of the convening authority:

HEADQUARTERS
THIRTY-FIRST DIVISION,
CAMP BLANDING, FLORIDA,
May 28, 1941.

In the foregoing case of Second Lieutenant *Horace D. Hester* (O–366390), 124th Infantry, the sentence is approved. Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld.

(Signed) John C. Persons,
(Typed) JOHN C. PERSONS,
Major General, U. S. Army,
Commanding.

The sentence having been approved by the convening authority, the record of trial forwarded for the action of the President, and the record of trial having been examined by the Board of Review in The Judge Advocate General's Office, and the Board of Review having submitted its opinion in writing to The Judge Advocate General, and the record of trial, the opinion of the Board of Review, and the recommendations of The Judge Advocate General having been transmitted directly to the Secretary of War for the action of the President, and having been laid before the President, the following are his orders thereon:

In the foregoing case of Second Lieutenant *Horace D. Hester* (O–366390),

124th Infantry, the findings of guilty and the sentence are disapproved.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
July 21, 1941.

Second Lieutenant *Horace D. Hester* (O–366390), 124th Infantry, was restored to a duty status July 23, 1941.

BY ORDER OF THE SECRETARY OF WAR:

G. C. MARSHALL,
Chief of Staff.

OFFICIAL:
E. S. ADAMS,
Major General,
The Adjutant General.

GENERAL COURT-MARTIAL ORDERS, NO. 100

WAR DEPARTMENT,
Washington, May 7, 1943.

Before a general court martial which convened at Camp Murphy, Florida, December 19, 1942, pursuant to paragraph 21, Special Orders No. 293, Headquarters Fourth Service Command, Office of the Commanding General, Atlanta, Georgia, December 8, 1942, as amended by paragraph 17, Special Orders No. 300, Headquarters Fourth Service Command, Office of the Commanding General, Post Office Building, Atlanta, Georgia, December 16, 1942, was arraigned and tried—

Second Lieutenant *Donald V. Marks,* O–455524, Signal Corps.

CHARGE I: "Violation of the 93rd Article of War."

Specification.—"In that 2nd Lieutenant *Donald V. Marks,* Signal Corps, Army of the United States, assigned to the Officers Signal Corps Replacement Pool, did, at Camp Murphy, Florida, on or about October 11, 1942, feloniously take, steal and carry away one brown leather wallet, value about $2.50, one hundred dollars ($100.00) in United States currency, one "A" class gasoline rationing book value about $.03 and, one "B" class gasoline rationing book value about $.03, the property of 2nd Lieutenant William A. Brady, Signal Corps, Army of the United States, Officers Signal Corps Replacement Pool, Camp Murphy, Florida."

CHARGE II: "Violation of the 95th Article of War."

Specification.—"In that 2nd Lieutenant *Donald V. Marks,* Signal Corps, Army of the United States, assigned to the Officers Signal Corps Replacement Pool, did at Camp Murphy, Florida, on or about October 11, 1942, feloniously take, steal and carry away one brown leather wallet, value about $2.50, one hundred dollars ($100.00) in United States currency, one "A" class gasoline rationing book value about $.03, and one "B" class gasoline rationing book, value about $.03, the property of 2nd Lieutenant William A. Brady, Signal Corps, Army of the United States, Officers Signal Corps Replacement Pool, Camp Murphy, Florida."

PLEAS

To each charge and specification: "Not guilty."

FINDINGS

Of all specifications and charges: "Guilty."

SENTENCE

To be dismissed from the service.

The sentence was adjudged December 19, 1942.

The following is the action of the convening authority:

HEADQUARTERS FOURTH SERVICE COMMAND
OFFICE OF THE COMMANDING GENERAL
POST OFFICE BUILDING,
Atlanta, Georgia, January 25, 1943.

In the foregoing case of Second Lieutenant *Donald V. Marks*, O–455524, Signal Corps, Assigned Officers Signal Corps Replacement Pool, Camp Murphy, Florida, only so much of the findings of the specification of Charge I and the specification of Charge II as in each instance involves a finding of guilty of larceny of one Class A gasoline ration book as alleged, at the time and place and of the ownership alleged, of some value less than $0.03, is approved. The sentence is approved and the record of trial is forwarded for action under the 48th Article of War.

[Signed] Wm. Bryden,
[Typed] WM. BRYDEN,
Major General, U. S. Army,
Commanding.

The sentence having been approved by the convening authority, the record of trial forwarded for the action of the President, and the record of trial having been examined by the Board of

Review in The Judge Advocate General's Office, and the Board of Review having submitted its opinion in writing to The Judge Advocate General, and the record of trial, the opinion of the Board of Review, and the recommendations of The Judge Advocate General having been transmitted directly to the Secretary of War for the action of the President, and having been laid before the President, the following are his orders thereon:

In the foregoing case of Second Lieutenant *Donald V. Marks* (O–455524), the sentence is disapproved.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
May 1, 1943.

Second Lieutenant *Donald V. Marks*, O–455524, Signal Corps, was restored to duty May 6, 1943.

BY ORDER OF THE SECRETARY OF WAR:

G. C. MARSHALL,
Chief of Staff.

OFFICIAL:

J. A. ULIO,
Major General,
The Adjutant General.

GENERAL COURT-MARTIAL
ORDERS, No. 152

WAR DEPARTMENT,
Washington 25, D. C., 20 July 1943.

Before a general court martial which convened at Camp Roberts, California, 8 January 1943, pursuant to paragraph 19, Special Orders No. 276, Headquarters Camp Roberts, California, 19 November 1942, as amended by paragraph 5, Spe-

cial Orders No. 281, Headquarters Camp Roberts, California, 25 November 1942, as amended by paragraphs 11, 12 and 13, Special Orders No. 6, Headquarters Camp Roberts, Califoria, 7 January 1943, was arraigned and tried—

Second Lieutenant *Thomas J. Lanyon*, O–1770820, Field Artillery.

CHARGE: "Violation of the 93d Article of War."

Specification 1.—"In that *Thomas J. Lanyon*, Second Lieutenant, Field Artillery, Battery "C," 54th Battalion, Twelfth Field Artillery Training Regiment, Camp Roberts, California, did, at Camp Roberts, California, on or about 18 October 1942, feloniously take, steal, and carry away one dollar ($1.00), lawful money of the United States of America, the property of Robert E. O'Connell, First Lieutenant, Field Artillery, Battery "B," 54th Battalion, Twelfth Field Artillery Training Regiment, Camp Roberts, California."

Specification 2.—"In that *Thomas J. Lanyon*, Second Lieutenant, Field Artillery, Battery "C," 54th Battalion, Twelfth Field Artillery Training Regiment, Camp Roberts, California, did, at Camp Roberts, California on or about 18 October 1942, feloniously take, steal, and carry away one (1) certain Bank of America, National Trust & Savings Association, San Francisco, California Travelers Cheque Number A6715060, dated 3 October 1942, in the denomination of ten dollars ($10.00), value about ten dollars ($10.00), and one (1) certain Bank of America, National Trust & Savings Association, San Francisco, California Travelers Cheque Number A6715061, dated 3 October 1942, in the denomination of ten dollars ($10.00), value about ten dollars ($10.00), the property of George

A. McCaleb, Second Lieutenant, Field Artillery, Battery "A," 56th Battalion, Twelfth Field Artillery, Training Regiment, Camp Roberts, California."

PLEAS

To Specification 1 of the CHARGE: "Not guilty."
To Specification 2 of the CHARGE: "Not guilty."
To the CHARGE: "Not guilty."

FINDINGS

Of Specification 1 of the CHARGE: "Guilty."
Of Specification 2 of the CHARGE: "Guilty."
Of the CHARGE: "Guilty."

SENTENCE

To be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for one year.

The sentence was adjudged 8 January 1943.

The following is the action of the convening authority:

HEADQUARTERS CAMP ROBERTS
OFFICE OF THE COMMANDING GENERAL
CAMP ROBERTS, CALIFORNIA

4 FEBRUARY 1943.

In the foregoing case of Second Lieutenant *Thomas J. Lanyon*, O-1770820, Battery C, 54th Battalion, Twelfth Field Artillery Training Regiment, Camp Roberts, California, the sentence is approved. The Ninth Service Command Detention and Rehabilitation Center, Turlock, California, is designated as the place of confinement. Pursuant to Article of War 48, the order

directing the execution of the sentence, is withheld.

[Signed] A. W. Lane,
[Typed] A. W. LANE,
Brigadier General, U. S. Army,
Commanding.

The sentence having been approved by the convening authority, the record of trial forwarded for the action of the President, and the record of trial having been examined by the Board of Review in The Judge Advocate General's Office, and the Board of Review having submitted its opinion in writing to The Judge Advocate General, and the record of trial, the opinion of the Board of Review, and the recommendations of The Judge Advocate General having been transmitted directly to the Secretary of War for the action of the President, and having been laid before the President, the following are his orders thereon:

In the foregoing case of Second Lieutenant *Thomas J. Lanyon* (O–1770820), Field Artillery, the findings and sentence are disapproved.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
7 July 1943.

Second Lieutenant *Thomas J. Lanyon*, O–1770820, Field Artillery, was restored to duty status 10 July 1943.

BY ORDER OF THE SECRETARY OF WAR:

G. C. MARSHALL,
Chief of Staff.

OFFICIAL:

J. A. ULIO,
Major General,
The Adjutant General.

GENERAL COURT-MARTIAL
ORDERS, No. 436

WAR DEPARTMENT,
Washington 25, D. C., 15 August 1944.

Paragraph 2, General Court-Martial Orders, No. 188, War Department, Washington 25, D. C., 25 May 1944, is amended to read as follows:

2. Following are the Charges and Specifications on which First Lieutenant *James Bergman Benfield,* O-576921, Quartermaster Corps, was arraigned and tried at a former hearing before a general court martial which convened at Fort Knox, Kentucky, 15 October 1943, pursuant to paragraph 7, Special Orders, No. 245, Headquarters, Fort Knox, Kentucky, 9 October 1943, and which were not referred for rehearing, together with the action of the Court and reviewing authority thereon:

CHARGE: "Violation of the 96th Article of War."

Specification 2.—"In that First Lieutenant *James B. Benfield,* Infantry, Company A, 10th Armored Replacement Battalion, Armored Replacement Training Center, did, at Louisville, Kentucky, on or about August 24, 1943, with intent to deceive wrongfully, and unlawfully, make and utter to Stewarts Dry Goods Company, Louisville, Kentucky, a certain check in words and figures, to wit: August 24, 1943, Stewarts Dry Goods Company, Louisville, Kentucky, fifty five dollars ($55.00), and by means thereof did fraudulently obtain goods or services from Stewarts Dry Goods Company, Louisville, Ken-

tucky, in the value of fifty five dollars ($55.00), while the said 1st Lieutenant *James B. Benfield*, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens Union National Bank for the payment of said check."

Specifications 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and *19*, are identical in form and substance with *Specification 2*, except for the dates, amounts and names of payees which differ from it in the following, respectively:

	Date	Amount	Payee
Specification 5	August 28, 1943	$29.95	H. P. Selman & Co.
Specification 6	August 24, 1943	25.00	Stewarts Dry Goods Co.
Specification 7	September 6, 1943	10.00	Fort Knox Officers Club.
Specification 8	September 6, 1943	10.00	Fort Knox Officers Club.
Specification 9	September 9, 1943	10.00	Fort Knox Officers Club.
Specification 10	September 9, 1943	5.00	Fort Knox Officers Club.
Specification 11	September 17, 1943	12.00	Fort Knox Officers Club.
Specification 12	September 17, 1943	10.00	Fort Knox Officers Club.
Specification 13	September 18, 1943	10.00	Fort Knox Officers Club.
Specification 14	September 20, 1943	10.00	Fort Knox Officers Club.
Specification 15	September 24, 1943	10.00	Fort Knox Officers Club.
Specification 16	September 21, 1943	50.00	Fort Knox Exchange.
Specification 17	September 22, 1943	200.00	Fort Knox Exchange.
Specification 18	September 13, 1943	50.00	Levy Bros.
Specification 19	September 24, 1943	10.00	Fort Knox Officers Club.

Specification 23:—"In that First Lieutenant *James B. Benfield*, Infantry, Company A, 10th Armored Replacement Battalion, Armored Replacement Training Center, did, at Fort Knox, Kentucky, on or about 16 June 1943, borrow one hundred dollars ($100) from Sergeant Robert Brumbaugh, Headquarters Company, Headquarters and Service Battalion, Armored Replacement Training Center, to the prejudice of good order and military discipline."

Specification 24.—"In that First Lieutenant *James B. Benfield,* Infantry, Company A, 10th Armored Replacement Battalion, Armored Replacement Training Center, did, at Fort Knox, Kentucky, on or about 1 September 1943, with intent to deceive Major Melvin B. Hallett, Headquarters, Armored Replacement Training Center, officially state to the said Major Melvin B. Hallett that his total indebtedness was two hundred twelve dollars and fifty cents ($212.50), which statement was known by said First Lieutenant *James B. Benfield* to be untrue."

Specification 25.—"In that First Lieutenant *James B. Benfield,* Infantry, Company A, 10th Armored Replacement Training Battalion, Armored Replacement Training Center, having received a lawful command from Colonel Edwin C. Greiner, Headquarters Second Group, Armored Replacement Training Center, on or about September 15, 1943, 'not to write any checks unless he had sufficient funds in the bank to cover himself,' did fail to obey said order by writing numerous checks knowing full well that he did not have sufficient funds in the bank to cover the same:"

FINDINGS

Of *Specifications 1* through *22:* "Guilty."
Of *Specifications 23* and *24:* "Not guilty."
Of *Specification 25:* "Guilty."
Of the CHARGE: "Guilty."

ACTION

The sentence is disapproved.

Specification 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and *25,* of the CHARGE are withdrawn and will not be further prosecuted.

BY ORDER OF THE SECRETARY OF WAR:

G. C. MARSHALL,
Chief of Staff.

OFFICIAL:

J. A. ULIO,
Major General,
The Adjutant General.

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